

PUBLIC PROSECUTOR v. FOONG KOW & ORS.

[A.Cr.J. (MacIntyre J.) October 7, 1966]

[Ipoh — Criminal Appeal No. 26 of 1966]

Criminal Law and Procedure — Trial — Illegal entry and search of premises — Whether property found in search admissible in evidence — Cinematograph Films Ordinance, 1952, s. 24.

Cinematograph Films — Seizure of obscene films — Production of in evidence.

The accused had been charged for being in possession of obscene films and for abetment thereof. It appeared that the films were seized when the premises were entered into by the police. It was submitted that the entry was not made in compliance with section 24(2) of the Cinematograph Films Ordinance and therefore the exhibits seized could not be produced in evidence. The learned magistrate held that the failure to comply with section 24 of the Ordinance vitiated the trial and he discharged the accused.

Held: the fact that evidence was illegally obtained did not affect its admissibility and, as the learned magistrate was wrong in discharging the respondents, there must be an order for retrial in this case.

Cases referred to:—

(1) *Saminathan v. Public Prosecutor* [1937] M.L.J. 39.

(2) *Wong Liang Nguk v. Public Prosecutor* [1953] M.L.J. 246.

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Hamid bin Azmi (Deputy Public Prosecutor) for the appellant.

S. A. Lingam for the respondents.

MacIntyre J.: This is an appeal by the public prosecutor from the order of the learned magistrate at Batu Gajah, discharging the accused, such discharge not amounting to an acquittal, in criminal case No. A 114 of 1965 on a charge of being in possession of 5 reels of obscene films, an offence punishable under section 24(1) of the Cinematograph Films Ordinance and on a charge of exhibiting obscene films without affixation of a mark of approval by the Minister under section 9(2) of the same Ordinance and punishable under section 15. This appeal is also against a similar order made by the same magistrate in criminal case No. A 115 of 1965, discharging 11 other accused persons of the offence of abetting the offence committed by the accused in criminal case No. A 114 of 1965 under section 15 of the said Ordinance.

All the 12 accused persons in the above cases are the respondents herein. Respondents Mohamed bin Noordin and Chan Ah Kai have not been served as their present whereabouts are unknown to the police and this decision is therefore in respect of the other 9 respondents only.

Both the cases were tried together and the facts are as follows: The respondents were arrested at Batu Gajah by a police inspector and a party of policemen in the course of a raid on a private house on information received that an obscene film show was about to begin. On the

arrival of the police a number of persons in the house ran out and escaped into the dark. The 12 respondents were found and arrested in a room in the house. When the police entered the room they found a cinema projector which was still warm with the 1st respondent seated behind it. The projector was facing the wall which served as a screen and five obscene films were found beside it.

At the trial counsel for the respondents objected to the production of the projector, the rolls of film and certain tools and appliances found in the room on the ground that they were not admissible in evidence as the premises in question were not entered into by the police in compliance with section 24(2) of the Cinematograph Films Ordinance. The section authorizes only the Chief Police Officer, any Censor or Assistant Censor or Inspector of Cinematograph Films to enter and search the premises without a warrant and to seize any film or part thereof or to take into custody any person reasonably supposed to be in possession thereof. This objection was sustained by the court, and the respondents were discharged. In the opinion of the learned magistrate, the failure to comply with section 24 vitiated the trial.

There can be no doubt that the learned magistrate misdirected himself on the law. Illegal entry and search by the police may give rise to a cause of action for damages to a person who feels that the sanctity of his home had been violated; but the illegality cannot vitiate the trial of any person found committing an offence in the premises when it was raided or render inadmissible in evidence any incriminating implements or documents found therein.

The effect of illegal entry and search by the police was considered by Aitken J. in *Saminathan v. Public Prosecutor* ⁽¹⁾ and he says in his judgment, and I quote:

"... there is an overwhelming mass of authority for the proposition that the legality or illegality of a man's arrest does not concern the court which is trying him."

And again on the admissibility of certain documents seized by the police in the course of an illegal search, he says:

"Here again I have come to the conclusion that the manner in which the police obtained possession of these documents does not concern the magistrate who is trying him."

Finally, in the case of *Wong Liang Nguk v. Public Prosecutor* ⁽²⁾ Thomson J., as he then was, said:

"... the fact that evidence is unlawfully obtained does not affect its admissibility (See *Taylor on Evidence* 11th Edition para. 922). If the police officer in this case had no authority to search then no doubt he would have been open to some sort of civil action but the question of his authority to search is completely irrelevant to the admissibility in evidence of his statement of what he found in the course of his search. That, I think, is

abundantly clear as a matter of general principle and in particular relation to this type of case it was accepted as so long ago as 1936 by Aitken J. in the case of *Saminathan v. Public Prosecutor*."

I therefore set aside the order of the learned magistrate discharging the respondents except in so far as it affects Mohamed bin Noordin and Chan Ah Kai, and order a re-trial before another magistrate since the magistrate who heard the case has left Ipoh on transfer. The appeal against the order of discharge in respect of the said Mohamed bin Noordin and Chan Ah Kai will no doubt be heard in due course when the notice of hearing is served on them.

Order accordingly.

SWAMY v. MATTHEWS & ANOR.

[O.C.J. (Ismail Khan J.) October 8, 1966]

[Seremban — Civil Suit No. 44 of 1957]

Negligence — Medical practitioner — Standard of care.

In this case the plaintiff claimed damages for negligence on the part of the first defendant, a medical officer employed by the second defendant, in treating the plaintiff for an itch on his hands by injecting an arsenical preparation, acetylarsan, which was alleged to have resulted in paralysis of his hands and legs. The medical evidence showed that it was not certain that the injections caused the paralysis.

Held: the plaintiff had not discharged the onus of showing that the injection of acetylarsan was the cause of the paralysis and further there was no evidence to show that the first defendant had been negligent in prescribing the injection.

Cases referred to:—

- (1) *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.
- (2) *Roe v. Minister of Health* [1954] 2 W.L.R. 915.
- (3) *Hancke v. Hooper* (1835), 7 C. & P. 82.

CIVIL SUIT.

Dato' S. P. Seenivasagam for the plaintiff.

N. A. Marjoribanks for the first defendant.

Wong Seng Chow for 2nd defendant.

Cur. Adv. Vult.

Ismail Khan J.: The plaintiff was until his disablement an estate conductor who was employed at the relevant time by the second defendant. The first defendant is a medical practitioner engaged by the second defendant, as visiting medical officer, to look after the health of the company's employees. The plaintiff claims damages for negligence on the part of the first defendant in treating the plaintiff for an itch on his hands by injecting a drug which was alleged to have resulted in paralysis of the hands and legs, while the company is said to be responsible for the tort of its agent on the ground of *respondeat superior*.

The facts as found by me or admitted are

A as follows. On 31st July, 1956, the doctor prescribed an injection of acetylarsan, an arsenical preparation, which I find to have been administered without any other reaction in the plaintiff than a trivial rise in temperature. Although this injection was strenuously denied by the plaintiff, I accept the defence on this point, borne out as it is by my own examination of the relevant entry in D3 which I am fully satisfied was genuine and made at the time the treatment was given.

On 21st September, 1956, another entry was made by the doctor in D3 to this effect:—

C "Samy. Early pneumonia. Keep in touch with me if temperature flares."

On this occasion the plaintiff went to the hospital at Seremban for three days. In the statement of claim it was alleged that after an injection of acetylarsan the plaintiff's "face as well as his body was swollen accompanied by a rise in temperature," and it was this very condition that led to his being sent to hospital. My finding on this point, however, is that he did receive an injection of an adult dose, that subsequently he had a rise in temperature, but there was no swelling of the face or body as alleged. The doctor's diagnosis of pneumonia was borne out not only by the entry I have just referred to, but also by the evidence of the plaintiff's own witness Lopez. There is no evidence to support the plaintiff's own allegation of the swelling.

The next or third occasion when the plaintiff was given an injection was on 23rd November, 1956. Four days later, the doctor ordered that he be sent to the Seremban hospital. To the medical officer on duty he sent a letter by the patient requesting a "full investigation *re* general debility, chronic nocturnal cough and dermatitis," and adding a note that the patient was "sensitive to arsenical drugs." As to the sensitivity, I accept the doctor's explanation which seems to me wholly reasonable. The plaintiff stayed in hospital from 3rd December, 1956 to 30th January, 1957. His illness was diagnosed as "polyneuritis (?) arsenical" — see D9. This ailment resulted in paralysis of the plaintiff's arms and legs and his services were dispensed with by his employers, the second defendant, who on 5th February, 1957 (see P2) offered him one month's pay in lieu of notice. By his reply dated 13th February, 1957 (see D4) the plaintiff rejected the notice and claimed to be entitled to continue on the company's payroll and to occupy free quarters until his recovery on the ground that his disability was brought about by the treatment he had been given for his skin disease. On 31st July, 1957, the plaintiff commenced this action.

In the particulars of negligence alleged against the first defendant, it was stated (a)